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Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide

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Abstract

This article discusses one of the most controversial yet important modes of liability in international criminal law: joint criminal enterprise (JCE). One such controversy is whether Third Category JCE can serve as a basis for genocide convictions. To answer this question one needs to uncover the nature and origins of JCE. It is submitted that convictions for genocide based upon the application of Third Category JCE are justifiable. This contention stems from the premise that JCE is a form of criminal participation to which principles of derivative liability apply. However, such an approach is only valid when JCE is stripped to its core and applied as a small-scale group crime, which requires proof of a direct link between co-perpetrators. Moreover, in the case of Third Category JCE, a participant should be convicted of participating in genocide, which would carry a lower sentence than committing genocide as a participant in a First or Second Category JCE.

1. Introduction

This article discusses one of the most controversial yet important modes of liability in international criminal law, joint criminal enterprise (JCE). The concept of JCE has provided the legal basis for many convictions at the International Criminal Tribunal for the former Yugoslavia (ICTY) and increasingly plays a similar role at the International Criminal Tribunal for Rwanda (ICTR). Yet, there is considerable uncertainty as to its scope and there are conflicting views as to its nature. For this reason, JCE liability *and* its application to the crime of genocide remain as contentious as they are undetermined.

What follows is an attempt to resolve these uncertainties by uncovering the nature and origins of JCE. This requires a retracing of the development of JCE in international law and an examination of national equivalents.

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Only after having clarified JCE's origins, subsequent development and position in the overall picture of criminal participation can one attempt to answer the central question: can JCE form a basis for genocide convictions?

2. JCE in Past and Present International Case Law

A. Past

Prosecutors and judges at the military commissions and tribunals set up after the Second World War relied on a 'group crime concept', in addition to the theory of accomplice liability, in prosecuting and convicting Nazi supporters who had been involved in mob violence against the Allied military and resistance forces. They based criminal liability on the concept of 'acting with a common design' derived from English criminal law. Common design liability as interpreted in these proceedings, required proof of an awareness on the part of the defendant (*mens rea*) that in some way his/her conduct contributed to the crime (*actus reus*).[1] The physical element was very vague, being loosely limited to the condition that the accused's cooperation in the war machine had a 'real bearing' on the crime.[2] Liability under the common design theory requires a lower degree of participation than accomplice liability, which calls for a substantial effect on the crime by the principal offender. Moreover, according to the common design theory, distinguishing between perpetrator and accomplice is irrelevant, as all the defendants are regarded as participants in the crime. The 'common design' concept was relied upon to convict concentration camp personnel[3] and those involved in mob violence.[4]

B. Present

History appears to have repeated itself in The Hague. The ICTY devised a group liability concept to prosecute and convict those involved in collective crimes. The *Tadić* case illustrates this. While the Trial Chamber in *Tadić* found that the accused could not be sentenced for the killing of five men in the village of Jaskíci since there was no evidence that he had taken part in these killings,[5] the Appeals Chamber, by relying on the concept of common purpose,

1 See *Werner Rohde & Eight Others* United Nations War Crimes Commission, *Law Reports of War Criminals* (UNWCC) (London: HMO 1947–1949), Vol. V, 56; *Bruno Tesch & Others* (*Zyklon B* case) UNWCC, Vol. I, at 101.

2 *Max Wielen & Seventeen Others* (*Stalag Luft III* case) UNWCC, Vol. XI, 46.

3 *Martin Gottfried Weiss & Thirty-Nine Others* (*Dachau Concentration Camp case*) UNWCC, Vol. XI, 5–17.

4 *Otto Sandrock & three others* case UNWCC, Vol. IV, 40; *Erich Heyer & Six Others* (The *Essen Lynching* case) cited in Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999 (hereinafter *Tadić* Appeal Judgment), §§ 204–209; *Kurt Goebell et al.* (The *Borkum island* cases) cited in *Tadić* Appeal Judgment, §§ 210–213.

5 Opinion and Judgment, *Tadić* (IT-94-1-T), Trial Chamber II, 7 May 1997 (hereinafter *Tadić* Judgment), § 373.

convicted Tadić. According to the Appeals Chamber, relevant case law shows that common purpose, later referred to as 'Joint Criminal Enterprise', encompasses three distinct categories of crimes.[6] Tadić was held responsible under the Third Category, representing the lowest level of involvement. In sharing the intent to remove people from Jaskíci, he was found to be equally responsible for the five deaths since they were perpetrated in the course of the removal and could be considered a predictable consequence of the removal.

All three categories distinguished by the Trial Chamber, a basic form (First Category JCE), a systematic form (Second Category JCE) and an extended form (Third Category JCE) of common purpose/JCE, require evidence of:

(i) a plurality of persons organised in a military, political or administrative structure,
(ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute,
(iii) participation in that plan/common design (*actus reus*).[7]

With regard to *mens rea*, the First and Second Category JCE require 'an intention to participate in and further the criminal activity or purpose of the group', thus suggesting that all participants possess the same intent, whereas a participant in a Third Category JCE can be held responsible for crimes falling *outside* the joint criminal enterprise, provided: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[8] In the latter case, *dolus eventualis* or advertent recklessness suffices as the requisite mental element.

Tadić could not have been convicted for the five deaths at Jaskíci on the basis of accomplice liability provided for in Article 7(1) as 'aiding and abetting . . . in a crime'. The prosecution would have had to prove that Tadić had carried out acts specifically directed at assisting, encouraging or lending moral support to the killings while the support must have had a substantial effect on the underlying crime.[9] As with post Second World War case law, a group crime concept was relied upon in prosecuting those involved in mob violence.

6 (i) *The first category* relates to cases where all co-defendants possessing the same intent pursue a common criminal design, for instance the killing of a certain person.
(ii) *The second category* concerns the so-called 'concentration camp' cases, where the requisite *actus reus* comprises the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprises: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill treat inmates. Intent may *also* be inferred from the accused position within the camp.
(iii) *The third category* concerns cases where 'one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose'. *Tadić* Appeal Judgment, *supra* note 4, § 204.

7 *Tadić* Appeal Judgment, *supra* note 4, § 228.
8 *Ibid.*
9 *Ibid.*, § 192.

In the Tribunals' case law, JCE has not only been used to prosecute and convict those engaged in group crime and mob violence. This liability mode has been used in prosecuting the *auctor intellectualis*, those political and military superiors masterminding international crimes. The most conspicuous example of this prosecutorial policy was the case against Slobodan Milošević.[10] Another is the *Krajišnik* case, where the Trial Chamber convicted a former member of the Bosnian Serb leadership for committing crimes through partcipation in a JCE that involved Karadžić and other Bosnian Serb leaders.[11]

From a prosecutorial point of view, JCE has appeal because it captures an array of criminal conduct of those who knowingly participate in the criminal endeavour.[12] Because of the higher evidentiary standards for superior responsibility, which often features as the subsidiary mode of liability on the indictment of those accused in superior positions,[13] and because of the limits of accomplice liability, JCE became the preferred liability theory of international prosecutors. In the absence of a general conspiracy concept (i.e. applicable to crimes against humanity and war crimes as well), by filling a gap left by accomplice liability and by taking over superior responsibility's role in prosecuting senior defendants, JCE rapidly developed into the most important liability mode at the ICTY.

3. Joint Criminal Enterprise — a Controversial Concept

The concept of JCE, as developed by the ICTY, has evoked strong criticism from practitioners, academics and even from one of the ICTY judges. Judge Per-Johan Lindholm in his Separate Opinion to the *Simić* judgment wrote: 'I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally . . . The concept or 'doctrine' has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law.'[14]

10 Indictment ('Bosnia Herzegovina'), *Milošević* (IT-01-51-I), § 5–31; First Amended Indictment ('Croatia') *Milošević* (IT-02-54-T), § 5–33; Second Amended Indictment *Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Vlajiko Stojiljković* (IT-99-37-PT), § 16–29:

11 Judgment, *Krajišnik* (IT-00-39-T), Trial Chamber I, 27 September 2006 (hereinafter *Krajišnik* Judgment).

12 See J.S. Martinez and A.M. Danner 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' 93 *California Law Review* (2005) 75, at 102–120.

13 Superior responsibility requires proof beyond reasonable doubt that superiors have effective control over their subordinates (functional element), that they had information within their possession that would have put them on notice of the crimes (allegedly) committed by subordinates (cognitive element) and that they failed to prevent or punish the crimes (operational element). This relates especially to the hierarchical structure or chain of command between senior (political) figures and the actual perpetrators (local war lords and paramilitary units) and the knowledge of, and effective control over, every single crime are elements, which in practice are difficult to prove.

14 Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, Judgment, *Simić* (IT-95-9-T), Trial Chamber II, 17 October 2003, § 2–5.

In the following, some of this 'confusion' will be highlighted. Bearing in mind the vast case law relating to JCE liability, this account is by no means exhaustive. The reference to cases below is merely illustrative.

A. Controversy over Scope

The JCE concept has been criticized for extending the limits of individual criminal responsibility. In particular, the Second and Third Categories JCE have been censured as bordering on collective responsibility, since the punishment exceeds the actual contribution to the commission of a crime.

Second Category JCE deals with crimes committed within a system of ill-treatment, such as in a detention camp. The *Tadić* Appeals Chamber held that the *actus reus*, the active participation in the enforcement of the system of ill treatment, could be inferred from the position of authority within the camp.[15] This is a broad test, especially when one bears in mind that *mens rea*, personal knowledge of the system of ill treatment, may be proved by 'a matter of reasonable inference from the accused's position of authority'.[16] As a result, criminal responsibility would be primarily based on a person's *position*, which would violate fundamental principles of criminal law such as the maxim 'no culpability without personal fault'. The *Krnojelac* Trial Chamber refused to apply the 'inference test' of Second Category JCE and relied on the requirements of the basic First Category JCE instead.[17] The *Kvočka* Trial Chamber, however, welcomed the systematic Second Category JCE while accepting that the Second World War concentration camp cases '[e]stablish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the camp therein'.[18] As one commentator argues, relying on Second Category JCE seems to entail a shift in the burden of proof with regard to knowledge and intent.[19]

Third Category JCE has been met with equal suspicion, mostly by 'outsiders'. Danner and Martinez argue that the extended form of JCE, i.e. Third Category JCE, may result in guilt by association because liability may attach to low-level members of the JCE for *all* the crimes perpetrated by the enterprise.[20] Osiel is arguably even more critical than Danner and Martinez, observing that JCE liability '[l]ures international law to a point where liability threatens to exceed the scope of moral culpability'.[21]

15 *Tadić* Appeal Judgment, *supra* note 4, § 203.

16 *Ibid.*, § 228.

17 Judgment, *Krnojelac* (IT-97-25-T), Trial Chamber I, 15 March 2002, § 78 (hereinafter *Krnojelac* Judgment).

18 Judgment, *Kvočka* (IT-98-30/1-T), Trial Chamber I, 2 November 2001, § 278 (hereinafter *Kvočka* Judgment).

19 V. Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia', 5 *International Criminal Law Review* (2005) 167–2001, at 190.

20 Martinez and Danner, *supra* note 12, at 137.

21 M.J. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', 105 *Columbia Law Review* (2005) 1751–1862, at 1772.

There have been efforts at the ICTY to prevent JCE liability from over-expanding. The Appeals Chamber in *Krnojelac* found that using JCE as a mode of liability '[r]equires a strict definition of common purpose', while the principal perpetrators who physically commit the crime 'should be defined as precisely as possible'.[22] With regard to Second Category JCE, the *Kvočka* Appeals Chamber ruled that under certain circumstances evidence may be required to prove that the accused made a 'substantial contribution' to the joint criminal enterprise.[23]

The most recent attempt to limit JCE liability is the Trial Chamber judgment in *Brđanin*.[24] The Trial Chamber determined that JCE liability requires proof of an agreement between the 'physical'/actual perpetrator and the 'non-physical' perpetrator/participant in a JCE. This link must be further specified. Moreover, proof of an agreement between 'non-physical' perpetrators among themselves; for instance, the leadership of the SerBiH, does not fulfil the 'agreement requirement' of JCE liability.[25] If upheld on appeal, JCE may no longer be used as a liability theory in large-scale enterprises with defendants who are structurally far removed from the actual scene of the crimes. It is hardly surprising that the Trial Chamber in *Milošević* ordered *amicus curiae* observations on the issue of JCE and superior responsibility.[26]

B. Controversy over Nature

From the very beginning, when JCE/common purpose was introduced as a mode of liability, its nature has been hotly contested. Is it a species of perpetration, or was it a form of complicity/accomplice liability/criminal participation?

The *Tadić* Appeals Chamber treated JCE ambivalently. On the one hand, the chamber brought the concept under the heading 'committing' and distinguished it from aiding and abetting a crime, which, it held, is generally couched in terms of 'participating' in an offence[27] and which was found to '[u]nderstate the degree of criminal responsibility'.[28] On the other hand, it referred to common purpose/JCE as 'a form of accomplice liability'.[29]

22 Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, § 116 (hereinafter *Krnojelac* Appeal Judgment).

23 Judgment, *Kvočka* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, § 97 (hereinafter *Kvočka* Appeal Judgment).

24 See for an elaborate account and commentary: K. Gustafson, 'The Requirement of an "Express Agreement" for Joint Criminal Enterprise Liability' in this Symposium.

25 Judgment, *Brđanin* (IT-99-36-T), Trial Chamber I, 1 September 2004, § 347 (hereinafter *Brđanin* Judgment).

26 Order on *Amicus Curiae* observations *proprio motu* on the desirability of submissions on the alternative basis of individual criminal responsibility alleged in the case and on the issue of trials in absentia, *Milošević* (IT-02-54-T), 1 July 2005.

27 In this it relied on the text of Art. 2(3)(c) of the International Convention for the Suppression of Terrorist Bombing, See *Tadić* Appeal Judgment, *supra* note 4, § 221.

28 *Ibid.*, § 192

29 *Ibid.*, § 220.

To complicate matters even further, the Appeals Chamber used the terms 'perpetrator' and 'co-perpetrator' to refer to a *participant* in a JCE.[30]

The ambivalence over common purpose/JCE can be traced to its hybrid civil/common law heritage. Co-perpetration is a civil law concept that is used to distinguish those who are closely involved in committing a crime from those merely assisting the commission of a crime. The latter contribution to the crime is subject to a lower maximum sentence. This categorization of offenders was introduced into the Tribunals' case law along the lines of civil law. In contrast, JCE as such was thought to be a form of common law accomplice liability. As a result of the confusion over perpetration and JCE, the two concepts have been subject to competing interpretations in subsequent decisions and judgments.

The courts have neither consistently applied nor disregarded the distinction between types of offenders. Judge Hunt, in his separate opinion to the *Odjanić* jurisdiction decision, criticized the attempt to categorize different types of offenders. He was of the view that:

> No such distinction exists in relation to sentencing in this Tribunal, and I believe that it is unwise for this Tribunal to attempt to categorise different types of offenders in this way when it is unnecessary to do so for sentencing purposes. The Appeals Chamber has made it clear elsewhere that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.[31]

The *Krnojelac* Trial Chamber[32] did '[n]ot accept the validity of the distinction . . . between a co-perpetrator and an accomplice'[33] but adopted the expression co-perpetrator 'for convenience' when referring to a participant in a JCE. The *Krnojelac* Trial Chamber made a point in stating that it considered a coperpetrator to be an *accomplice* and not a principal offender.[34] However, the *Krstić* and *Kvočka* Trial Chambers readily accepted the distinction between co-perpetrators and aiders and abettors.[35]

C. Controversy over Applicability

The biggest controversy relating to JCE is whether its extended form can apply to a special intent crime such as genocide. Can a participant in a Third Category JCE be held responsible for the commission of genocide when genocidal crimes have been committed as a natural and foreseeable consequence of a JCE? This is a question of *mens rea*. While genocide requires evidence of a *dolus specialis*, i.e. the intent to destroy in whole or in part, a national, ethnic, racial or religious group, Third Category JCE requires

30 *Ibid.*, § 192.

31 Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise, *Milutonović et al.* (IT-99-37-AR72), 21 May 2003, § 31.

32 This Trial Chamber was presided over by Judge David Hunt.

33 *Krnojelac* Judgment, *supra* note 17, § 77.

34 *Ibid.*

35 Judgment, *Krstić* (IT-98-33-T), Trial Chamber I, 2 August 2001, §§ 643–645 (hereinafter *Krstić* Judgment); *Kvočka* Judgment, *supra* note 18, § 284.

dolus eventualis/advertent recklessness adopting a foresight test. When the Trial Chamber in *Krstić* convicted Krstić as a participant in a Third Category enterprise, it substituted the genocide requirement for the highest degree of intent, *dolus specialis* with the lowest degree of intent, *dolus eventualis*. This seems to be an incoherent construction. The Appeals Chamber in *Krstić* did not pronounce clearly on the issue when it entered a conviction for aiding and abetting in genocide instead.[36] The Trial Chamber in *Stakić*, however, did when it ruled:

> Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to 'commit' genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of 'escalation' to genocide, or genocide as a 'natural and foreseeable consequence' of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).[37]

The Trial Chamber in *Brđanin* took a similar approach in its 98*bis* decision.[38] However, the decision was reversed on appeal. The Appeals Chamber held that, as a mode of criminal liability, Third Category JCE is no different from other forms of criminal liability that do not require proof of full intent to commit a crime before liability can attach. As with aiding and abetting, and superior responsibility, knowledge suffices.[39] An accused *can* be held responsible for committing genocide where genocide is a natural and foreseeable consequence of his acts. This view was adopted by the Trial Chamber in *Milošević*.[40] However, as Mettraux rightfully points out, the decision of the Appeals Chamber in *Brđanin* does not provide any precedential authority such that the question whether Third Category JCE can provide the basis for genocide convictions remains debatable and unsettled.[41]

4. Genocidal Intent

A. Purpose-based versus Knowledge-based

Ever since the *Akayesu* judgment, the ad hoc Tribunals have interpreted genocidal intent as *dolus specialis*. There, the Trial Chamber held that, 'special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'. This interpretation, which may be termed a

36 Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, §§ 135–144 (hereinafter *Krstić* Appeal Judgment).

37 Judgment, *Stakić* (IT-97-24), Trial Chamber II, 31 July 2003, § 530 (hereinafter *Stakić* Judgment).

38 Rule 98*bis* Decision, *Brđanin* (IT-99-36-T), Trial Chamber, 28 November 2003, § 29 (hereinafter *Brđanin* 98*bis* Decision).

39 Decision on Interlocutory Appeal, *Brđanin* (IT-99-36-A), Appeals Chamber, 19 March 2004, § 7 (hereinafter *Brđanin* Interlocutory Appeal Decision).

40 Decision on Motion for Judgment of Acquittal, *Milošević* (IT-54-02-T), Trial Chamber, 16 June 2004, § 291 (hereinafter *Milošević* Decision on Acquittal).

41 G. Mettraux, *International Crimes and the* ad hoc *Tribunals* (Oxford: OUP, 2005), at 265.

purpose-based interpretation,[42] has been adopted in subsequent ICTR rulings and in the ICTY appellate judgment in *Krstić*.[43]

However, the purpose-based interpretation has been challenged. At the ICTY, prosecutors have objected to it, arguing that it sets too high a standard.[44] In scholarly writing, this complaint has resounded. Commentators have argued that genocide should comprise those acts that one *knows* lead to the destruction of a group,[45] or whose foreseeable or probable consequence is the destruction of a group.[46] This approach, the 'knowledge-based interpretation' of genocidal intent, was proposed by Greenawalt already in 1999.[47] Recently, Kress has suggested that the International Criminal Court (ICC) judges adopt the knowledge-based approach, proposing they take a fresh look at the matter and ignore the purpose-based interpretation of the ad hoc Tribunals.[48] Kress argues that the latter should be regarded as not having been settled by the case law of the ICTY and the ICTR.[49] This seems to be a bold statement.

Kress' plea for a knowledge-based approach to genocidal intent is appealing. He criticizes the inverse relationship between the *actus reus* and *mens rea* of genocide brought about by the purpose-based approach. Genocide connotes collective activity of a group which '[c]annot simply be combined with a mental requirement that is more typical for the leadership level without running into conceptual problems'. His suggestion to remedy this incoherence by adopting the knowledge-based standard is a principled and attractive way out of some of the conceptual problems encountered when prosecuting individuals for genocide. Kress proposes that genocidal intent require (a) knowledge of a collective attack directed to the destruction of at least part of a protected group and (b) *dolus eventualis* as regards the occurrence of such destruction.[50]

In arguing in favour of a knowledge-based approach, Kress points out that it is already part of ICTY and ICTR case law, albeit not explicitly. The Tribunals' practice of inferring genocidal intent from a pattern of conduct introduces a knowledge-based approach 'through the evidential backdoor'.[51] In *Akayesu*,

42 C. Kress, 'The Darfur Report and Genocidal Intent', 3 *Journal of International Criminal Justice* (2005) 562–578, at 566.

43 *Krstić* Appeal Judgment, *supra* note 36, § 134.

44 Prosecution's Appeal Brief, *Jelišić* (IT-95-10-A), at § 4 and 22; See Judgment on Defence Motions to Acquit, *Sikirica* (IT-95-8-T), Trial Chamber III, 3 September 2001, § 27.

45 A.K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation', 99 *Columbia Law Review* (1999) 2259–2295, at 2288; H. Vest, *Genozid durch organisatorische Machtapparate* (Baden Baden: Nomos Verlagsgesellschaft, 2002) 104 et seq. (referred to by Kress, *supra* note 42).

46 E. David, *Principes de droit des conflits armés* (Bruxelles: Bruylant, 1999), at 615; Kress, *supra* note 42, 562–578; A. Gil Gil, *Derecho Penal Internacional: Especial consideracíon del delitto de genocide* (Madrid, Editorial Tecnos, 1999), 259 *et seq.* (referred to by Kress).

47 Greenawalt, *supra* note 45, at 2259.

48 Kress, *supra* note 42, 562–578.

49 *Ibid.*, at 578.

50 *Ibid.*, at 577.

51 *Ibid.*, at 571–572.

the Trial Chamber held that genocidal intent could be inferred from '[t]he high number of atrocities committed against the Tutsi, their widespread nature . . . and . . . the fact that the victims were systematically and deliberately selected'. Jørgensen understandably wonders whether this truly satisfies the specific intent requirement or is only sufficient to prove knowledge.[52] Moreover, some of the Tribunals' findings on *dolus specialis* remain ambiguous and in *Krstić* the Appeals Chamber failed to clarify these ambiguities.[53] In this light, Kress's statement seems less bold.

Nevertheless, the formula used by the Tribunals insists on a purpose-based interpretation of genocidal intent for principal perpetrators and this cannot be ignored.[54] The ad hoc Tribunals were the first international criminal tribunals to apply the Genocide Convention and, as a result, have significantly contributed to the development of the concept. Therefore, it is not possible to simply brush aside their interpretation of genocidal intent. Moreover, the purpose-based approach finds support in the *travaux préparatoires* of the Genocide Convention and national law concepts reflecting general principles of law. The latter may not necessarily be couched in terms of 'special intent', but concepts that have a similar theoretical structure as 'purpose-based' genocide exist.[55]

Against this background, it is questionable whether or not the ICC has the liberty to take a 'fresh look' and *redefine* genocidal intent. Having said that, the ambiguity of some of the Tribunals' findings and the inference test leave the impression of a half-hearted approach towards the purpose-based interpretation of genocidal intent. A better solution may be for the ICTY and ICTR appellate judges to pronounce with greater clarity on the issue of genocidal intent and *reformulate* some of their findings in a coordinated effort to explain *dolus specialis* for JCE in genocide cases.

B. Complicity and Aiding and Abetting

In *Krstić*, the ICTY Appeals Chamber found Krstić guilty of aiding and abetting genocide. The Appeals Chamber was of the view that an aider/abettor does not need to share the specific intent to commit genocide, it is sufficient that the accused rendered substantial assistance to the commission of the crime

52 N.H.B. Jørgensen, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice', 1 *International Criminal Law Review* (2002) 285–313, at 298.

53 Consider, for instance, § 571 of the *Krstić* Trial Chamber, where the Trial Chamber required the perpetrator would act '[w]ith the *goal* of destroying all or part of a group' and §§ 622 and 634 where it was sufficient that the accused was aware of the overall genocidal activity. *Krstić* Judgment, *supra* note 35. See Kress, *supra* note 42, at 566 and E. Van Sliedregt, Commentary to Krstić Judgment, in A. Klip and G. Sluiter, *Annotated Leading Cases VII* (Antwerpen, Oxford, New York: Intersentia, 2005) 767–772.

54 See *Krstić* Judgment, *supra* note 35, § 571, and *Krstić* Appeal Judgment, *supra* note 36, § 134.

55 In its essence, special intent is a purpose-oriented intent, distinguishable from general intent by requiring the actor to desire a particular purpose See O. Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 *Leiden Journal of International Law* (2001) 399–408, at 403–404.

knowing the intent behind the crime.[56] In *Blagojević & Jokić* this ruling was endorsed. The Trial Chamber held that aiding and abetting genocide requires that the accused (i) carried out an act which consisted of practical assistance, encouragement or moral support to the principal that had 'substantial effect' on the commission of the crime; (ii) had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender and (iii) knew that the crime was committed with specific intent.[57]

There has been confusion at both the ICTR and the ICTY on the interpretation of 'aiding and abetting genocide' and 'complicity in genocide'. The former is encapsulated as a mode of non-genocidal liability in Article 6(1)/7(1) of the ICTR/Y Statutes; the latter is penalized as a form of genocide in Article 2/4(3)(e) of the ICTR/Y Statutes. Anglo-American complicity law, on which the ICTY and ICTR provisions on criminal responsibility are modelled, provides that 'aiding and abetting' are just two ways in which an accessory assists in the commission of an offence and can subsequently be held liable for *complicity* in the crime.[58] The question arises whether, and if so, how, aiding and abetting and other notions of complicity differ.

The main issue of contention has been whether the *mens rea* for 'complicity in genocide' and the *mens rea* for 'aiding and abetting genocide' require proof of *dolus specialis*/special genocidal intent or whether the 'reduced' *mens rea* standard of knowledge of genocidal intent suffices. After a series of contradictory judgments at both the ICTY and the ICTR on this issue,[59] the recent appellate judgments at the ICTY in the *Krstić* case and at the ICTR in the *Ntakirutimana* case seemed to have settled the matter, at least in part.[60] For aiding and abetting genocide, knowledge of genocidal intent suffices. It remains unclear, however, exactly what the appropriate mental standard for other types of complicity in genocide comprises. The rather enigmatic phrase that 'there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group',[61] stated in

56 *Krstić* Appeal Judgment, *supra* note 36, § 140.

57 Judgment, *Blagojević & Jokić* (IT-02-60-T), Trial Chamber I, 17 January 2005, § 782.

58 J.C. Smith, *Smith & Hogan. Criminal Law* (8th edn., London/Edinburgh/Dublin: Butterworths, 1996), at 130; *Att.-Gen. Reference* (No. 1 of 1975), [1975] 2 All ER 684, at 686.

59 For a description see Mettraux, *supra* note 41, 263–265 and L.J. van den Herik and E. van Sliedregt, 'Ten Years later, the Rwanda Tribunal still faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes, 17 *Leiden Journal of International Law* (2004) 537–557, at 544–551.

60 In a recent national trial where a Dutch national was accused of supplying chemicals to Saddam Hussein and prosecuted for aiding and abetting genocide, the judges applied these findings as 'sufficiently developed' and 'settled in law' [author's translation]. District Court, The Hague, 23 December 2005, LJN:AU8685 (not yet reported). (http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp; visited 13 February 2006). For a commentary on the case, see H.G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction', 4 *Journal of International Criminal Justice* (2006) 239–257.

61 *Krstić* Appeal Judgment, *supra* note 36, footnote 247.

a footnote in the *Krstić* appeal judgment and reiterated in the *Milošević* Acquittal Decision,[62] leaves the issues of complicity in genocide unresolved.

C. JCE and Aiding and Abetting

The *Tadić* Appeals Chamber distinguished between aiding and abetting and common-purpose/JCE liability.[63] This distinction has been upheld in subsequent law, and it is now generally accepted that aiding and abetting and JCE are distinctive modes of liability; the latter connotes a close involvement in the commission of a crime and the former constitutes mere facilitation. The fact that JCE liability has been termed co-perpetration or joint perpetration, where participants share the intent of the physical perpetrator, results in the overall understanding that, unlike aiding and abetting genocide, participants in a First or Second Category JCE have genocidal intent themselves. The issue is more contentious, however, with regard to Third Category JCE where *dolus eventualis* suffices as the requisite *mens rea*.

D. The Purpose Element

Much has been said and written on the structure of genocidal intent. This discussion will not be repeated here, yet the following remarks should be made. In a purpose-based approach, genocidal intent is an *additional* subjective element of the crime, which characterizes an act as genocide. Genocidal intent, thus, consists of two mental elements. First, the additional subjective element, or 'purpose-element' ('intent to destroy . . .'), which is comprised in the chapeau of the provision and, second, general *mens rea*, which is the pendant of the *actus reus* of the genocidal act, for instance killing.

Two positions exist with regard to genocidal intent, as aforementioned. One would be to argue that genocidal intent invariably requires proof that the individual had 'an intent to destroy . . .'. As Mettraux argues, 'the chapeau element should be met individually'.[64] The Trial Chambers in *Stakić* and *Brđanin* adopted the same position when holding that knowledge of the principal's genocidal intent is not sufficient to be held responsible for a genocidal offence.[65]

The other position would be to maintain that the aider and abettor or participant in a JCE does not need to have genocidal intent himself. He can be held liable for genocide when there is proof that his knowledge or *dolus eventualis* extends to (i) the genocidal act and (ii) the principal's genocidal intent. The *dolus eventualis* test would require a participant to have knowledge of the genocidal intent and to willingly take the risk that such intent may 'materialize'. The purpose element could thus be satisfied by 'knowledge of intent'.

62 *Milošević* Decision on Acquittal, *supra* note 40, § 248.
63 *Tadić* Appeal Judgment, *supra* note 4, § 229.
64 Mettraux, *supra* note 41, at 259.
65 *Stakić* Judgment, *supra* note 37, § 530. *Brđanin* Judgment, *supra* note 25, § 29.

This was accepted by the Appeals Chamber in *Brđanin* and the Trial Chamber in the *Milošević* Rule 98*bis* decision.

There is support for the second position in national law, which, in turn, could be a source of international law and an authority for the Tribunals to rely on.[66] However, before any useful comparative law study can be undertaken on this point a few issues should be clarified with regard to the nature of JCE. This requires deconstructing JCE and analysing the individual constituents.

5. Deconstructing JCE

A. Anglo-American Law Origins

To fully understand the concept of JCE, and address the controversies the concept evokes, one needs to examine the structure of Anglo-American accomplice liability/complicity and the civil law concept of co-perpetration. Both liability theories lie at the basis of the JCE concept. With regard to accomplice liability/complicity, it suffices to cite Kadish:

> The secondary party's liability is derivative, which is to say, it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed. It is not direct, as it would be if causation analysis were applicable. That is ruled out by our concept of human action, which informs much of complicity doctrine. Volitional actions are the choices of the primary party. Therefore they are his acts, and his alone. One who 'aids or abets' him to do those acts, in the traditional language of the common law, can be liable for doing so, but not because he has thereby *caused* the actions of the principal or because the actions of the principal are his acts. His liability must rest on the violation of law by the principal, the legal consequences of which he incurs because of his own actions.[67]

The structure of Anglo-American complicity, with a perpetrator who most immediately or directly *causes* the *actus reus*, and an accomplice, whose responsibility derives from that of the principal, has its limits.[68] Take, for instance, the following situations: (1) each participant makes a direct causal contribution to an element of the *actus reus* and (2) only the act of one causes the *actus reus* while both participants share the *mens rea*. An example of the first situation is the case where each of the joint principals stab P,

66 See Triffterer, *supra* note 55, 403–404. In Dutch law a participant could be held responsible for a principal's special intent by way of *dolus eventualis*. See M.M. van Torenburg, *Medeplegen* (Co-perpetration) (Tilburg: W.E.J. Tjeenk Willink, 1998), at 113; Noyon-Langemeijer-Remmelink, *Wetboek van Strafrecht* (Code of Criminal Law — A Commentary) suppl. 121, Art. 47, Dutch Penal Code, § 25. See also references in *Krstić* Appeal Judgment, *supra* note 36, § 141.

67 S.H. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine', 73 *California Law Review* (1985), 323 *et seq.*, 337.

68 See for a discussion on the relationship between causation and complicity: K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: OUP, 1991), at 69; Kadish, *supra* note 67, at 333; H.L.A. Hart and A.M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959).

who dies of the combined effect of the wounds, and each is liable for his own act and, to the extent of his own *mens rea*, each can be considered a principal.[69] An example of the second situation is A and B setting out to murder P, but it is A who actually carries out the plan. Both A and B can be considered joint *principals*.[70]

The strict principal–accomplice structure is not well suited to deal with situations in which A and B are joint principals where each make an essential causal contribution to an element of the *actus reus*.[71] The doctrine of common purpose or JCE compensates for this 'deficiency' in Anglo-American complicity law by not requiring an exact identification of the causal contributions that led to the offence(s), but rather leaving them under the cover of 'joint enterprise' or 'common-purpose'.[72] Common- purpose/JCE liability is based on the principles of accomplice liability where the responsibility of the one is derived from the causal contribution of the other and where joint 'principals' are each liable for their joint acts and are punished for the principal crime.[73] It still is *derivative* liability: where a person fulfils some of the *actus reus* elements himself. In other words, a person's liability for the crime must rest in part on the conduct of another.[74] The distinction between a joint principal and an abettor may, however, be difficult to identify. According to Smith and Hogan, this distinction is immaterial; it does not matter in which capacity one commits a crime, as perpetrators and secondary parties are *equally* liable.[75]

The common-purpose/JCE doctrine introduces a 'foreseeable risk' test and brings within the scope of complicity the acts committed by a principal who goes of on a frolic of his own. This is why the concept was relied upon in the *Tadić* case with regard to the Jaskíci murders. This type of 'collateral' or extended liability is based in English law on the rule that when A and B share the common purpose of committing an offence, B is also liable for a crime which he did not intend, assist, or encourage A to commit, if he knew that A might do the act while committing the 'agreed crime'.[76] The criminal liability lies in participating with foresight.[77] This test is similar to the reckless

69 *Smith & Hogan, supra* note 58, at 147.

70 It was held in *Rook* that the same principles apply to a party who is absent as to one who is present, [1993] 2 All ER 955, at 130. After all, the absent party may well be the 'mastermind' and the most culpable party. *Smith & Hogan, supra* note 58, at 147.

71 Smith, *supra* note 68, at 80, footnote 101.

72 *Ibid.*, at 209–234.

73 *Smith and Hogan, supra* note 58, at 147.

74 See Kadish, *supra* note 67, at 344–345, n. 36.

75 *Smith and Hogan, supra* note 58, at 127–129.

76 Smith, *supra* note 68, at 209 and *Smith and Hogan, supra* note 58, at 148, referring to the decision of the Privy Council in *Chan Wing-Sing v. R.* (1985) 80 Cr App Rep 117: '(The principle) turns on contemplation . . .. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight'.

77 A. Ashworth, *Principles of Criminal Law* (Oxford: OUP, 2003), at 434.

knowledge test of complicity liability in English law[78] and is not very different from the mental standard for aiding and abetting at the ICTY, where one can be held liable for aiding and abetting a crime of which one is aware that it 'will probably be committed'.[79]

JCE liability, as developed and applied in international case law, can be seen as compensating for the deficiencies of Anglo-American inspired complicity law. It fulfils the same function as common purpose liability in national law and as common design liability in post Second World War case law.[80] It introduces a group responsibility concept that offers a way out of complicated causality problems in mob violence situations.

B. Civil Law Origins

Co-perpetration or joint perpetration is recognized as a separate ground of liability in most civil law systems. Joint perpetration, such as the German '*Mittäterschaft*', the Belgian '*coaction*', or the Dutch '*medeplegen*' are distinguished from complicity by requiring more than mere facilitation.[81] Co-perpetration connotes full cooperation in the crime. In those systems that recognize two types of accomplices — co-perpetrators and facilitators — it has proved difficult to distinguish between the two. Yet, this is vital, since facilitators, who have a subsidiary status as helpers, are punished less severely than co-perpetrators. French law, like Anglo-American law, has struggled to accommodate the notion of co-perpetrator or '*coauteur*' because of the derivative nature of its complicity theory, based on the notion of '*emprunt de penalité*'.[82] Under the 1810 Code, the accomplice was punished *as a* principal, while under Articles 121–7, the accomplice is now punished *as if he were* the principal. '*Coauteurs*' are distinguished from accomplices in that they are liable in their own right. The difference between '*coauteurs*' and accomplices is that the '*coauteur*' is *considered to have* performed the acts, which constitute the offence, whereas the accomplice has performed mere ancillary acts with a view to

78 In *DPP for Northern Ireland v. Maxwell* ([1978] 3 All ER 1140), a reckless knowledge test was introduced for complicity. As to the mental element of the accomplice, it suffices that he '[k]nows that one or more of a group of offences is virtually certain to be committed, which means that in relation to the one(s) actually committed there was knowledge only of a risk that it would be actually committed — and that amounts to recklessness'. Ashworth, *supra* note 77, at 442.

79 Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber II, 10 December 1998, § 246.

80 See § 2 above. As one commentator said, '[a]s distinct from common crimes, international crimes are almost always committed not by one person, but by several or many persons — a group, a band, a clique'. See A.N. Trainin, *Hitlerite Responsibility under International Law* (London: Hutchinson & Co, 1944), at 79. See also D. Cohen 'Beyond Nuremberg: Individual Responsibility for War Crimes' in C. Hesse and R. Post (eds) *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), at 53–92.

81 Mittäterschaft, Art. 25(2) German Penal Code, Coaction, Art. 66 Belgian Penal Code, Medeplegen, Art. 47(1) Dutch Penal Code.

82 F. Desportes and F. Le Gunehec, *Le Nouveau Droit Pénal* (7th edn., Paris: Economic, 2000), § 566, at 494.

assisting the offence.[83] In essence the '*coauteur*' is a secondary party, just like any other accomplice.

It is clear, then, that while First and Second Category JCE are most obviously rooted in civil law systems, Third Category JCE has equivalents in civil law systems as well, albeit not as readily recognizable. In Dutch law, Third Category JCE would qualify as co-perpetration since the *mens rea* for criminal participation, including co-perpetration, comprises *dolus eventualis*.[84] Other civil law systems provide for Third Category JCE equivalents in concepts that penalize membership of a criminal organization.[85] While JCE differs in nature from the latter concepts, some of the principles underlying 'membership responsibility' may be seen to reflect the essence of JCE.

The summary overview above indicates that co-perpetration as a separate mode of liability at the Tribunals is rooted in the civil law system. By now the term co-perpetrator has been accepted in ICTR/Y case law, as is the view that it generally connotes a more serious contribution to the commission of a crime than mere aiding and abetting.[86] However, there is still discussion as to the nature of JCE. Is it derivative or primary responsibility? While certain terminology has been adopted 'by convenience', there is no common understanding on this issue. It suffices at this point to conclude that First and Second Category JCE clearly have a civil law pedigree while Third Category JCE, or at least its principles are not alien to civil law systems.

6. Reconstructing JCE

On the one hand, Judge Hunt was right when he found that JCE liability is a type of accomplice liability and that participants in a JCE are in reality accomplices. On the other hand, those whose views he disputed, who maintained that JCE is co-*perpetration*, were also right. This is so since JCE is a merger of common law and civil law. JCE in international law is a unique (*sui generis*) concept in that it combines and mixes two legal cultures/systems.

The fact that JCE is composed of elements originating from different legal cultures and applied by persons from varying legal backgrounds may account

83 J.S. Bell et al., *Principles of French Law* (Oxford: OUP, 1998), at 238.

84 Dutch Supreme Court, 20 January 1998, NJ (Dutch Law Reports) 1998, 426.

85 French law penalizes 'participation in a group formed or an understanding reached for the perpetration of one of the felonies specified in Arts 211–1, 212–1, and 212–2 (genocide, crimes against humanity, and war crimes, *EvS*), when evidenced by one or more overt acts', Art. 212–3, § 1 Code Pénal [Translation: *The American Series of Foreign Penal Codes*, Vol. 31: France (1999)]. See also Desportes and Le Gunehec, *supra* note 82, at 461. Moreover, the French concept of '*association de malfaiteurs*' — a concept that inspired the drafters of the Nuremberg Statute to penalize membership of a criminal organization — has been equally devised to deal with mob violence by overcoming causality problems, Arts. 450–1 to 450–4 of the Code Pénal. Dutch law provides for an analogous concept in Art 140 of the Dutch Penal Code. [Translation: *The American Series of Foreign Penal Codes*, Vol. 30: The Netherlands (1997)].

86 *Krnojelac* Appeal Judgment, *supra* note 22, § 75; *Kvočka* Appeal Judgment, *supra* note 23, §§ 87–92.

for the misapprehension and differing views that exist with regard to JCE. That is why an attempt will be made in the following text to see JCE in its constituent, national parts, and to understand its application in international law and its position within the bigger picture, *viz*. criminal participation in international criminal law.

A. Scope

In an attempt to reconstruct JCE, one needs, first of all, to realize how JCE differs from aiding and abetting. The Appeals Chamber in *Tadić* ruled that to be an aider and abettor one must carry out acts that are specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime. In contrast, in the case of JCE, it is sufficient for the co-perpetrator to somehow contribute to furthering the common plan or purpose. This lower standard of participation, the objective element, is offset by the fact that liability under the JCE theory requires a criminal plan, or common design.[87] With aiding and abetting, the principal may not even know of the contribution of the aider and abettor.[88]

The 'common-purpose/plan element' is JCE's distinctive feature, making it a more serious contribution to a crime than aiding and abetting *and* capable of compensating for the lack of physical/tangible involvement in the actual commission of the crime. In the Tribunals' case law there have been attempts to interpret the 'plan element' beyond its original understanding, i.e. an agreement between a 'physical' and a 'non-physical' perpetrator. By expanding JCE to include those who plan crimes at a senior level, far removed from the scene of the crimes, such interpretations are essentially developing JCE into a surrogate conspiracy concept. The underlying rationale of the Trial Chamber's 'explicit agreement requirement' in *Brđanin* was to dismiss such an understanding of JCE.

The common purpose links the physical perpetrator to the non-physical perpetrator and provides the basis for attributing individual criminal responsibility. It requires participants in a JCE to either share the intent in pursuing the common purpose, or to foresee the crime as a natural consequence of the common purpose.[89] Satisfying these 'subjective elements' would require an identification of the members of the JCE. However, this has proved to be problematic in practice. Inferring intent by way of circumstantial evidence has been the preferred solution. The Trial Chamber in *Krajišnik* clarified the law on this point by requiring that persons in a criminal enterprise must be shown to act together.[90] From such joint action the element of a common objective may be inferred.

87 See also Gustafson, *supra* note 24, at 9–10.
88 *Tadić* Appeal Judgment, *supra* note 4, § 229
89 *Tadić* Appeal Judgment, *supra* note 4, § 204.
90 *Krajišnik* Judgment, *supra* note 11, at § 834.

Haan rightfully points out that there is an inconsistency between JCE in theory and in practice.[91] For prosecutors, not much is required to satisfy JCE's subjective elements of a common plan and *mens rea*. It suffices to point at the inference test applied to Second Category JCE. Moreover, recent attempts to limit JCE's expansive scope by imposing additional conditions for participation[92] result in overemphasizing the objective element. This way the objective–subjective balance of JCE has been reversed. The threshold for *actus reus* is increased while the *mens rea* threshold is very low.[93] Against that background, the 'express agreement requirement' proposed by the Trial Chamber in *Brđanin* should be welcomed.[94] It limits the scope of JCE whilst restoring the proper subjective–objective balance, bringing JCE closer to its original meaning.

B. Nature

Any attempt to identify the nature of JCE liability would first require determining what JCE is *not*. JCE is not a 'preparatory' crime like conspiracy. Moreover, participating in a JCE is a route to the commission of a crime.[95] It is not a crime in itself as was suggested by the Trial Chamber in *Kvočka* and corrected on appeal.[96]

The confusion regarding the nature of JCE liability evolves around whether JCE liability constitutes a form of *perpetration* or *participation*. Resolving this confusion is particularly relevant when one attempts to answer the question whether JCE can be a basis for genocide convictions. Unlike participants, perpetrators are required to have genocidal intent themselves.

The different views that exist on the nature of JCE liability may be explained as a problem of misleading terminology. The term co-perpetrator suggests that a participant in a JCE is a *principal* rather than a *participant* who *commits* rather than *participates* in a crime. Illustrative of this point is the ruling in the *Krnojelac* case, where the Trial Chamber held that participating in a JCE could not be brought under 'commission' within the meaning of Article 7(1) of the ICTY Statute since that notion was reserved for the principal physical perpetrator of the crime.[97]

Another reason for the perpetration-participation confusion is possibly the divergent position in various national legal systems. In Anglo-American law, JCE liability is a form of criminal *participation*. The French legal system adopts

91 Haan, *supra* note 19, at 194–195.

92 For instance, by requiring the accused to make a substantial contribution to the JCE. *Kvočka* Appeal Judgment, *supra* note 23, § 278.

93 Haan, *supra* note 19, at 195.

94 See for another view, Gustafson, *supra* note 24.

95 Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, *Milutinovic et al.* (IT-99-37-AR72), Appeals Chamber, 21 May 2003, § 20.

96 *Kvočka* Appeal Judgment, *supra* note 23, § 91.

97 *Kvočka* Judgment, *supra* note 18, § 73. Corrected in *Kvočka* Appeal Judgment, *supra* note 23, § 73.

a similar approach.[98] In German law, however, the '*Mittäter*' is considered a perpetrator.[99] In Dutch law, a '*medepleger*' qualifies as a participant. [100] The Tribunals, composed of international lawyers of various nationalities, have adopted differing conceptions of perpetration–participation.

The Appeals Chamber in *Tadić* seems to have adopted the Anglo-American approach, which is hardly surprising bearing in mind JCE's origin. It held that '[t]he *commission* of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through *participation* in the realization of a common design or purpose [emphasis added]'.[101] As a result, JCE should be regarded as a form of criminal participation — a more neutral term than accomplice liability — to which principles of derivative liability apply. This is also in line with JCE's customary law status. The post Second World War concepts of 'being concerned in' or 'participating in a common design' generated a body of case law on which JCE liability was modelled. Past and present international practice indicates that JCE is based on Anglo-American principles and has been applied as such.

Considering JCE as a form of criminal participation would not ignore the concept's civil law origins. This is so because civil law does not exclude branding co-perpetration as participation; moreover, JCE is a more serious degree of liability than aiding and abetting. It is worth recalling here Spencer's comments to *Chan Wing-Siu v. R*.[102] This was a case before the Privy Council, where three men were convicted of murder while it was not clear who had stabbed the person but all were found guilty because the crime was thought to be 'within their contemplation'. Spencer admits that the strict rule of within contemplation/common purpose is not sensible '[f]or those who furnish minor assistance'.[103] Indeed, the 'civil law correction' to JCE liability, bringing with it the categorization of aiding and abetting as a less serious contribution to the commission of a crime, is a welcome contribution to the participation model in international law.

The preceding account concludes that:

(i) JCE liability has developed into a *sui generis* concept with elements derived from both civil law and Anglo-American law.
(ii) It most closely resembles the Anglo-American doctrine of common purpose and, as affirmed in past and present international case law, has been applied as such. As a result it should be regarded as a form of criminal participation to which principles of derivative liability apply.

98 Article 121–6 Code Pénal. H. Angevin and A. Chavanne (eds), *Juris-Classeur pénal* (Paris: Juris-Classeur, 1998) Complicité, Art. 121–6 et 121–7, Introduction, A et B, 1 à 16.
99 § 25(2) StGB. H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (5th edn., Berlin: Duncker & Humblot 1996), 645–646.
100 Article 47(1) sub 1 Dutch Penal Code. Noyon-Langemeijer-Remmelink, *supra* note 65, Art. 47, § 1a., at 324a–326a.
101 *Tadić* Appeal Judgment, *supra* note 4, § 188.
102 [1984] 3 W.L.R. 677.
103 J.R. Spencer, 'On Contemplating the Range of Contemplation', 44 *Cambridge Law Journal* (1985), at 10.

(iii) JCE creates a perpetrator status for those closely involved in the commission of an international crime, which constitutes a higher degree of culpability than aiding and abetting. In that sense it takes after civil law co-perpetration.
(iv) JCE's central element and distinctive feature is the requirement of a common plan and/or purpose. JCE liability requires a lower degree of participation than aiding and abetting, which is offset by proof of a shared intent or plan/common purpose.
(v) The 'common plan' element, being the central element of JCE liability, should be strictly construed to prevent it from becoming elusive.

7. Reconciling JCE and Genocide

We can now return to the question posed in the introduction: can JCE be a basis for genocide convictions? The answer would be: yes, but a conditional yes. JCE and genocide can only be reconciled when JCE is applied as a form of criminal participation.

A. Derivative Liability

Having determined that JCE is a form of criminal participation, which is governed by principles of derivative liability, it is only a small step to accepting that it can be applied to special intent crimes such as genocide (including its extended form). Just like aiding and abetting, no proof is required that the participant had genocidal intent himself or herself before a genocide conviction can be entered. This means that participating in a JCE to commit genocide may be established by being aware of the principal's genocidal intent and nevertheless continuing to engage in, what turn out to be, genocidal activities. Proof of foresight suffices. This was the reasoning behind the Appeals Chamber decision in *Brđanin*, endorsed by the Trial Chamber in *Milošević*,[104] when it held that Third Category JCE is no different from any other form of criminal participation and therefore does not require proof of full intent to commit a crime.[105]

How then can the seemingly inherent incompatibility in combining *dolus specialis* and *dolus eventualis* be solved? Again, the analogy with aiding and abetting is helpful. Participatory liability almost by definition combines mental elements that exist on different levels.[106] In trying to solve this incompatibility,

104 *Milošević* Decision on Acquital, *supra* note 40, § 291.
105 *Brđanin* Interlocutory Appeal Decision, *supra* note 39, § 7.
106 An aider and abettor does not share the intent of the principal. He or she must (i) be aware of the essential elements of the crime committed by the principal offender, including the principal's *mens rea* and (ii) further know that his or her own acts assisted in the commission of the specific crime in question. See *Krnojelac* Judgment, *supra* note 16, § 88–90 and R. Dixon et al., *Archbold International Ciminal Courts: Practice, Procedure and Evidence* (London: Sweet & Maxwell, 2003), § 10–15.

the mental elements should be seen as distinct. Participatory liability has its own mental element *through* which the mental element of the underlying crime is established. To suggest that combining JCE and genocide would be 'conflating' *dolus eventualis* and 'watering down' *dolus specialis*[107] would be to merge these two elements into one. It is worth reiterating Judge Shahabuddeen's dissenting opinion to the *Brđanin* appeal judgment:

> In my respectful interpretation, the third category of joint criminal enterprise mentioned in *Tadic* does not dispense with the need to prove intent; what it does is that it provides a mode of proving intent in particular circumstances, namely, by proof of foresight in those circumstances. (. . .)
> The third category of *Tadic* does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that that specific intent always has to be shown; if it is not shown, the case has to be dismissed.
> I do not think that *Tadic* spoke differently. The case, as I appreciate it, concerned not the principle of having to show intent, but a method of doing so. It is only the method that is being referred to when it is said that the case established a mode of liability.[108]

B. Purpose Element

Some have argued that genocidal intent, as an additional subjective element, is such a distinctive element of the crime that it always requires proof of 'intent to destroy . . .', also when it concerns criminal participation. The other position, advocated earlier, would be that a *special* intent crime like genocide is still governed by *general* principles of derivative liability and that genocide can be committed by relying on the *mens rea* and *actus reus* of criminal participation. This means that the special-intent/special-purpose element may be proved through a knowledge or foresight test. Both positions adopt the purpose-based approach to genocide; they differ, however, on the question of how genocidal intent should be proved. While a more in-depth comparative law study would be welcome on this issue, it is safe to assume at this point that there is authority in national and international law to support the Appeals Chamber findings in *Krstić* and in *Ntakirutimana* as to aiding and abetting genocide and in *Brđanin* as to Third Category JCE and genocide. A participant in genocide does not need to have genocidal intent himself or herself before a conviction for genocide can be entered.

C. Knowledge-based Approach

Introducing a knowledge or foresight test for genocide by way of criminal participation differs from Kress' knowledge-based approach. The latter's

107 *Stakić* Judgment, *supra* note 37, § 530.
108 Dissenting Opinion of Judge Shahabuddeen, *Brđanin* Interlocutory Appeal Decision, *supra* note 39, § 2, 4–5.

knowledge-test is based on a redefinition of the crime of genocide; the present approach follows from a reconstruction of JCE. As a result, his test constitutes a much lower threshold for proving genocidal intent than the one propounded above. Kress' test is satisfied with proof of knowledge of a collective attack that is aimed at destroying a certain group.[109] In other words, a participant may be held liable for genocidal acts committed by 'anonymous' principals. The JCE/participation approach, however, would still require a relationship between the participant and the principal perpetrator. Essentially, what the latter approach purports to do is adopt a knowledge-based approach to *participation* in genocide. It is a knowledge test that is only applicable within the constraints of derivative liability, which requires a direct link between co-perpetrators.

D. Culpability

What remains to be settled when reconciling JCE and genocide is the differentiation within the concept of JCE. Where First and Second Category JCE require participants to have genocidal intent themselves, participants in a Third Category JCE would 'only' have *dolus eventualis* with regard to genocidal intent. It is unsatisfactory that the latter would be put on a par with participants in First or Second Category JCE with regard to genocide convictions. To express the difference in culpability, and to further draw on the analogy with aiding and abetting, it is proposed here that participants in a Third Category JCE should be held responsible for *participating* in genocide, which attracts a lower sentence than committing genocide as a participant in a First, or Second Category JCE. Third category JCE liability would, however, still be higher on the scale of culpability than aiding and abetting genocide.

8. Conclusion

Convictions for genocide based upon the application of Third Category JCE are justifiable. This contention is based on the premise that JCE is a form of criminal participation to which principles of derivative liability apply. It follows from this premise that genocide can be committed by relying on the *mens rea* and *actus reus* of the particular form of criminal participation, be it aiding and abetting or participating in a JCE, to fulfil the *mens rea* requirement of the underlying crime. The special-intent/special-purpose element may thus be proved through a knowledge/foresight test. Such an approach is only valid when JCE is stripped to its core and applied as it was intended by the Appeals Chamber in *Tadić*.[110] To mark the distinction between the basic and the

109 Kress, *supra* note 42, at 577.

110 This author does not agree with the Trial Chamber's findings in the *Krajišnik* case (*supra* note 11) where JCE was applied to a large-scale enterprise with a changing purpose and differing membership. Such interpretation makes the central element of JCE liability, a 'common plan', elusive.

extended form of JCE with regard to genocide, where participants in the former have genocidal intent and participants in the latter do not, conviction and sentence should differ. In the case of Third Category JCE, a participant should be convicted of *participating in genocide* rather than of genocide. Such conviction would carry a lower sentence than *committing genocide* as a participant in a First or Second Category JCE.

JCE was referred to by the *Tadić* Appeals Chamber as a mode of liability 'warranted by the very nature of many international crimes which are committed not uncommonly in wartime situations'.[111] Indeed, war criminality connotes systematic violence and a plurality of offenders. This type of criminality, on a large and on a small scale, not only connotes group crime, it also suggests the existence of a mastermind, pulling the strings behind the scene of the crime. In the Tribunals' case law there have been attempts to rely on JCE for convicting this class of perpetrators. Such attempts should, however, be faulted. Having examined its origins and position within the model of criminal interpretation, it is submitted that JCE is not applicable to those masterminding international crimes.

On which basis, then, should such 'intellectual perpetrators' be held criminally responsible? This is a relevant question since these perpetrators are most likely to be prosecuted at the international level. One could, first of all, rely on conspiracy or incitement to commit genocide, concepts that are specifically devised for this type of perpetrator. Relying on conspiracy and/or incitement does require proof of a full genocidal intent. One could of course decide to rely on JCE, as was done in *Milošević* and *Brđanin*. This has the advantage of the lower *dolus eventualis* standard but the disadvantage of having to prove a direct link with the actual perpetrators, which will be difficult bearing in mind the perpetrator's senior position.

There is a third option, which requires further exploration: indirect perpetration. The ICC Statute provides for the concept of 'perpetration through another person', encapsulated in Article 25(3)(a) of the ICC Statute.[112] 'Perpetration through another person', or indirect perpetration, presupposes that the person who actually commits the crime can be used as an instrument of the individual in the background. The typical case of indirect perpetration, analogous to the '*auteur médiat*' in French law, '*mittelbaren Täterschaft*' in German law and the doctrine of innocent agency in Anglo-American law, would be to use a person as an instrument who is not criminally liable himself or herself.[113] Indirect perpetration in the ICC Statute, however, is even broader. The agent/direct perpetrator does not have to be *innocent*.[114]

111 *Tadić* Appeal Judgment, *supra* note 4, § 191.

112 See, for the concept of 'perpetration by means (of an agent)', E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Cambridge/The Hague: T.M.C. Asser Press, 2003), at 68–71.

113 See van Sliedregt, *supra* note 112, at 69–70.

114 The German '*Tatherrschaft*' theory equally provides for indirect perpetration without an innocent agent. C. Roxin, *Täterschaft und Tatherrschaft* (Berlin-New York: de Gruyter, 2000),

Indirect perpetration is not provided for in the ICTR and ICTY Statutes. Importing it into Tribunal law would require a progressive judicial development of the law. As with JCE liability, the concept of indirect perpetration would have to be brought under 'committing'.[115] Inserting indirect perpetration into the liability model of the ad hoc Tribunals would further require the identification of such a concept as reflecting a 'general principle of law' or customary international law. This calls for a survey of national legal systems and an examination of the drafts and deliberations with regard to Article 25(3)(a) of the ICC Statute. Creative law making should, however, not lead to a violation of the principle of *nullum crimen sine lege*. This commentator would, therefore, urge comparative law research into the concept of indirect perpetration to see whether such a concept indeed reflects customary international law and meets the *nullum crimen sine lege* criteria drawn up by the Appeals Chamber in the *Odjanic* case.[116]

Indirect perpetration would offer an escape from the restraints that a purpose-based approach to genocidal intent and principles of derivative liability would impose on prosecuting the mastermind. The latter theories require the liability of an intellectual perpetrator to be dependant on the collective. Some have tried to solve this problem by suggesting a redefinition of genocidal intent; others have adopted a novel interpretation of co-perpetration and JCE.[117] A better solution would be to rely on indirect perpetration where such a link with the collective would not be required. If the collective is considered a mere tool of the strategic perpetrator, it would make no difference whether they are guilty of genocide or not. Nevertheless, the intellectual perpetrator would still need to have genocidal intent. Developing indirect perpetration would have the additional advantage of letting JCE be what it is, a group crime concept and a form of derivative criminal responsibility.

242–52, 653–654. So does the Dutch doctrine of 'functional perpetration'. Dutch Supreme Court, 23 February 1954, *NJ* 1954, 378.

115 According to Black's Law Dictionary, to 'commit' means 'to perpetrate, as a crime'. The same source defines 'perpetration' as 'the act of one committing a crime either with his own hands, or by some means or instrument or through some innocent agent'. *Black's Law Dictionary* (6th edn., St. Paul, MN 1990), 273 and 1141.

116 Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, *Milutonovic et al.* (IT-99-37-AR72), Appeals Chamber, 21 May 2003, § 21.

117 The efforts of the Trial Chamber in *Stakić* to develop co-perpetration along the lines of German criminal law concepts such as '*mittelbare Täterschaft*' should be understood against that background. Such efforts should be faulted. The Trial Chamber relied exclusively on German law and failed to examine customary international law and/or general principles of law while developing a concept that bears no resemblance to JCE as introduced by the *Tadić* Appeals Chamber. *Stakić* Judgment, *supra* note 37, §§ 741–743.